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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1941

No. 1037

THE BRIDGEPORT CITY TRUST COMPANY and ARTHUR E.  
ALLING, Executors of the Estate of NOYES E. ALLING,  
*Petitioners,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

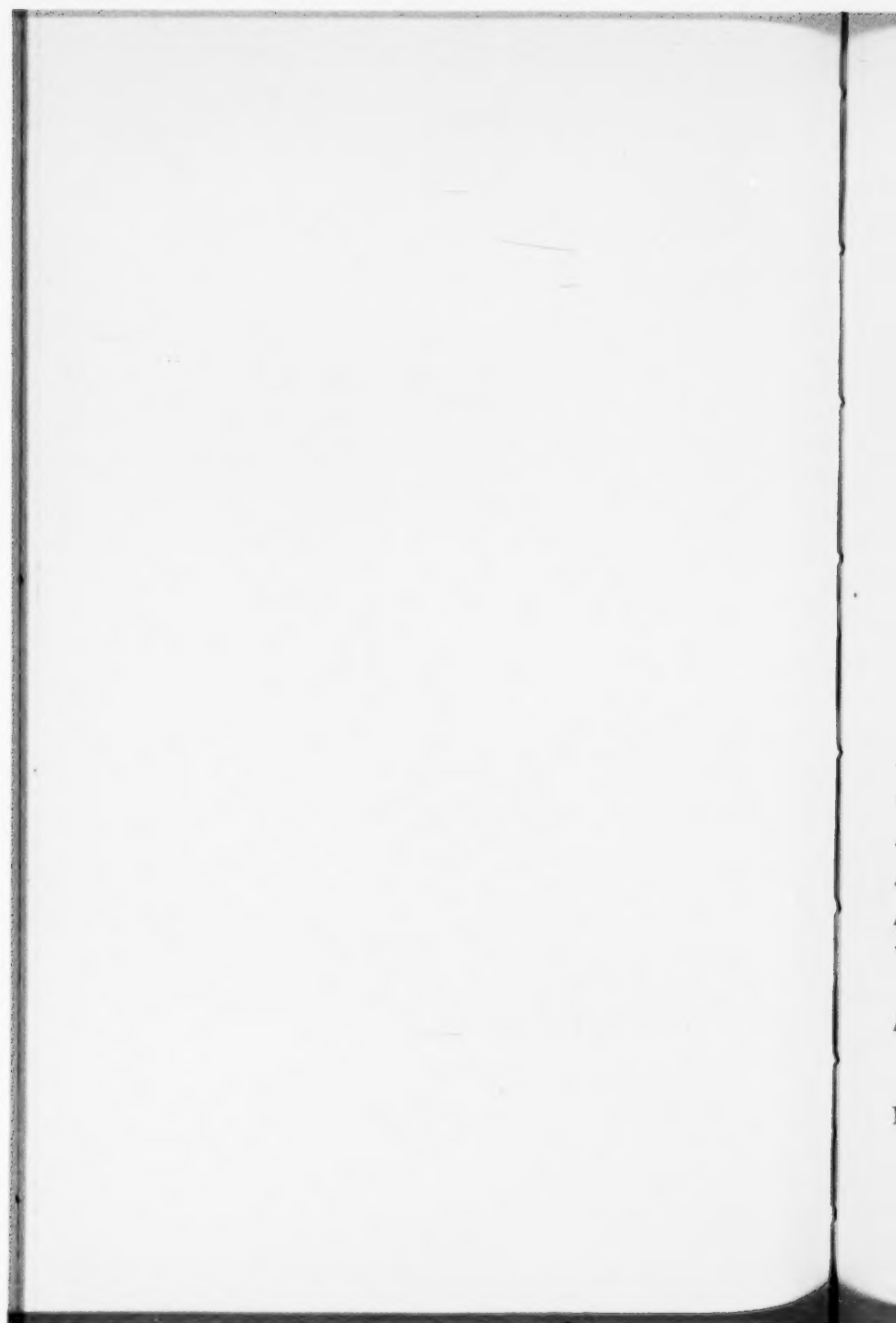
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**Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Second Circuit**

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Charles B. McInnis  
VALENTINE B. HAVENS,  
*Attorney for Petitioners.*

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*v.*

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

---

**Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Second Circuit**

The petitioners through their attorney of record pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on December 15, 1941, reversing the decision of the United States Board of Tax Appeals.

**Opinions Below**

The opinion of the United States Board of Tax Appeals (R. 43-63) is reported in 41 B. T. A. 191.

The opinion of the Circuit Court of Appeals (R. pp. 38-43) is reported in 124 F. (2d) 48.

### **Jurisdiction**

The judgment of the Circuit Court of Appeals was entered on December 15, 1941 (R. pp. 44-45). Jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **Question Presented**

The question presented is whether there should be included in the gross estate of petitioners' decedent under either Sec. 302(c) or 302(d) of the Revenue Act of 1926, as originally enacted, any part of certain property which was transferred in 1929 by petitioners' decedent to an *inter vivos* trust.

### **Statutes Involved**

The statutes involved are Secs. 302(c) and 302(d) of the Revenue Act of 1926, as originally enacted. In the Appendix annexed hereto will be found a complete text of the applicable statutes.

### **Statement**

The facts, as stipulated and adopted by the Board as its findings of fact (R. 46-54) may be summarized as follows:

Petitioners' decedent transferred in trust certain securities on January 10, 1929. The Trust Agreement provided for the payment of the income therefrom to the decedent's daughters, or the survivor or survivors of any of them, as long as they, or any of them, should live. After the death of the last surviving daughter, the income was to be paid to the decedent's grandchildren (excluding grand-

children thereafter born, according to the interpretation of the trust instrument by the Connecticut Courts) as long as any of such grandchildren, or the survivor or survivors of any of them, should live. The remainder thereafter was to go to the decedent's lineal descendants, with provision for distribution to charitable organizations if lineal descendants failed.

In the Trust Agreement, the decedent reserved during his lifetime the power to reallocate the disposition of the income of the trust fund, such reallocation to be limited strictly to those named as beneficiaries in the trust instrument. No action was taken by the decedent under this reserved power during his lifetime and he died on June 19, 1934.

The respondent's contention that the corpus of this trust, or at least the value of the beneficiaries' life interests, should be included in decedent's gross estate was denied by the United States Board of Tax Appeals. The Circuit Court reversed the Board, holding that there should be included in decedent's gross estate the value, as of the date of death of decedent, of the life interests of those beneficiaries of the trust over which the decedent had during his lifetime a certain reserved power of reallocation, as described above.

### **Specification of Errors to be Urged**

The Circuit Court of Appeals erred:

1. In holding that any part of the property transferred in trust should be included in decedent's gross estate under Sec. 302(d) of the Revenue Act of 1926.
2. In holding that the power of reallocation reserved to the decedent in the trust instrument should be construed

as including a power to reallocate income payable to any income beneficiaries other than the income payable to decedent's three daughters.

3. In failing to hold that no part of the property transferred in trust should be included in decedent's gross estate under either Sec. 302(c) or 302(d) of the Revenue Act of 1926, or any other applicable provisions of law.

4. In reversing the decision of the Board of Tax Appeals.

### Reasons for Granting the Writ

1. Petitioners contend that the Court below has rendered a decision in conflict with the decision of the Court of Appeals of the District of Columbia in the case of *Helvering v. Helmholz*, 75 Fed. (2d) 245, and in addition has decided a Federal estate tax question in a way probably in conflict with the decision of this Court in the same case, this Court having affirmed the Court of Appeals of the District of Columbia in the *Helmholz* case in 296 U. S. 93.

In the *Helmholz* case, the decedent during her lifetime had conveyed certain property to a trustee, income to be paid to the decedent during her lifetime and thereafter income to be paid to such living appointee or appointees during their lifetime as decedent should by her will designate. Upon the death of such appointee or appointees the corpus was to go irrevocably to certain specified remaindermen. Upon the decedent's death in 1927, she having by will designated her husband as the recipient of the income for the duration of his life, the Commissioner attempted to include the trust corpus in her estate for Federal estate taxation. The Commissioner contended *inter alia* that the



decedent's power to designate the income beneficiaries after her death made the property transferred a part of her gross estate under Sec. 302(d) of the Revenue Act of 1926. The Board of Tax Appeals denied his contention saying (pp. 171-172):

"In *Charles H. W. Foster, et al, Executors*, 26 B. T. A. 708, aff'd. C. C. A., 1st Cir., March 20, 1933, we said:

" \* \* \* Where, as here, gifts are made irrevocably to a trust and the donor reserves the income to himself for life and the right to designate the beneficiaries of the income after his death, which right is exercised in accord with the trust agreement, it is doubtful whether any portion of the trust property should be included in the decedent's gross estate in view of the decision in *May v. Heiner, supra*. Such doubts should be resolved in favor of the taxpayer (*Gould v. Gould*, 245 U. S. 151, 153), particularly in view of the fact that immediately following the *per curiam* decision in *Burnet v. Northern Trust Co., supra*; *Morsman v. Burnet, supra*; *McCormick v. Burnet, supra*, Congress amended Section 302 (c) of the Revenue Act of 1926 by joint resolution (public 131), approved March 4, 1931, which specifically provides for the inclusion of property transferred in trust where the transferor "has retained for his life \* \* \* the income from the property or \* \* \* the right to designate the persons who shall \* \* \* enjoy \* \* \* the income therefrom". The amendment was not retroactive and has been applied only to transfers "made after 10:30 P. M. \* \* \* March 3, 1931". Treasury Decision 4314. See *United States v. Field*, 255 U. S. 257."

"(P. 172) 'In the instant proceeding, Mrs. Helmholtz had irrevocably disposed of the corpus of the trust, and that property went to the remaindermen

designated in the trust agreement, upon the termination of the trust. She had no power to alter, amend, or revoke the trust instrument that would effect such a disposition as was possible in the *Porter* case and bring the property within the purview of subdivision (d).’ ”

The Court of Appeals of the District of Columbia affirmed saying (p. 247):

“\* \* \* we think it perfectly obvious, as the Board found, that in the trust agreement Mrs. Helmholz divested herself completely of legal title to the shares contributed by her to the trust estate and merely reserved a life interest in the income and a limited power of appointment respecting it; and, if we are correct in this conclusion, it follows that the value of the shares of stock which she transferred to the trust some nine or ten years before her death could not legally be included in determining the amount of her estate.”

This Court, in turn, affirmed the decision and in affirming was cognizant of the decedent’s reservation of a power of appointment over the income of the trust fund, as is indicated by the following statement from this Court’s opinion at Page 94.

“Her contribution was 999 shares, the dividends from which the trustee was to receive, and pay, less expenses, to Mrs. Helmholz for life, *remainder to her appointee by will* and remainder to her issue; \* \* \*” (Italics supplied.)

Although cognizant of this provision in the trust instrument, the Supreme Court made the following unequivocal statement at Page 96.

“The words of Section 302 (d) are, ‘where the enjoyment (of the transfer) was subject at the date

of his death to any change *through the exercise of a power*, either by the decedent alone or in conjunction with any person, *to alter, amend or revoke* \* \* \*.' The agreement under consideration contains no such power as that described."

In the instant proceeding, the decedent had at most a power during his lifetime to reallocate the income of the trust fund among the income beneficiaries. This is not as great a power as the decedent had in the *Helmholz* case, as in that case the decedent had the right to the income from the trust fund during her lifetime and in addition had the power to appoint whomsoever she chose as the recipients of the income upon her death.

If there was no power in the decedent to alter, amend or revoke under the trust instrument involved in the *Helmholz* case and the Board of Tax appeals, the Court of Appeals of the District of Columbia and this Court so held, it would follow *a fortiori* that the decedent in this case had no power to alter, amend or revoke under the trust instrument involved here.

Petitioners' contention that the instant case is controlled by the *Helmholz* case is corroborated by the opinion of the United States Board of Tax Appeals in the instant case, for the Board made the following statement in its opinion (R. 59-60)

"\* \* \* it is settled law that the retention of a power to alter the disposition of trust income does not make the trust a transfer to take effect at or after death; it is only a power to alter the disposition of corpus that has such estate tax consequence. *Waldemar R. Helmholz, Executor*, 28 B. T. A. 165; *affd.*, 75 Fed. (2d) 245; *affd.*, 296 U. S. 93; *Charles H. W. Foster et al., Executors*, 26 B. T. A. 708; *affirmed without opinion*, First Circuit Court of Appeals, March 20,

1933. The value of the corpus of this trust may not be included in decedent's gross estate under section 302 (c).

Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the value of the corpus of a trust in a decedent's gross estate where 'the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.' Here again, it is settled that the value of the corpus is not includable in the gross estate unless the power to alter, amend, or revoke extends to corpus. *Waldemar R. Holmholz, Executor, supra*. See also *McFadden v. United States*, 20 Fed. Supp. 625."

The same view as to the applicability of the *Helmholz* case to a situation of this kind is shared by a District Court decision in Pennsylvania (see *McFadden v. United States*, 20 Fed. Supp. 625) in which the Court made the following statement at Page 632:

"But even if the decedent had reserved a power to change the shares of *income* which his wife and children should receive *after his death, this alone would appear not to be such a power to alter or amend as the statute contemplates. Helvering v. Helmholtz*, 296 U. S. 93, 56 S. Ct. 68, 80 L. Ed. 76." (Italics supplied.)

While the Court below must necessarily have disagreed with these views as to the meaning and effect of the *Helmholz* case, it is petitioners' contention that, in view of the Board of Tax Appeals' interpretation of the *Helmholz* decision and a similar interpretation by other Federal Courts, that a writ of certiorari should be granted for the purpose of clarifying this controversial question.

In reversing the Board of Tax Appeals, the Court below did not consider the applicability of Section 302 (c) of the Revenue Act of 1926 inasmuch as it was unnecessary to pass on this question in view of the interpretation placed by the Court below on the scope of Section 302 (d). In this petition for certiorari it would, therefore, seem to be unnecessary and superfluous to discuss the applicability of Section 302 (c) to any extent other than to point out that the Board of Tax Appeals in the instant case held that Section 302 (c) was not applicable and other Court decisions have reached a similar conclusion on similar facts (see *Charles H. W. Foster et al, Executors*, 26 B. T. A. 708, aff'd without opinion C. C. A., 1st Cir., March 20, 1933; *Helvering v. Helmholz*, *supra*; *May v. Heiner*, 281 U. S. 238; *Burnet v. Northern Trust Company*, 283 U. S. 782; *Morsman v. Burnet*, 283 U. S. 783; and *McCormick v. Burnet*, 283 U. S. 784). It is recognized, of course, that if a writ of certiorari is granted, the respondent may argue the applicability of Sec. 302(c) and that petitioners will obviously have to reply to his argument at that time.

As to the interpretation of the clause in the trust instrument reserving to the decedent a power of reallocation of income among certain beneficiaries, petitioners recognize that it would be fruitless to argue that a writ of certiorari issue on the basis that the Court below has erroneously construed this clause of the trust instrument. Accordingly, no argument on this point is addressed to the Court in this petition, but petitioners wish to reserve this point for argument on the merits if a writ of certiorari is issued by this Court. This is one of the errors listed in the Specification of Errors to be Urged which appears above in this petition for certiorari.

**CONCLUSION**

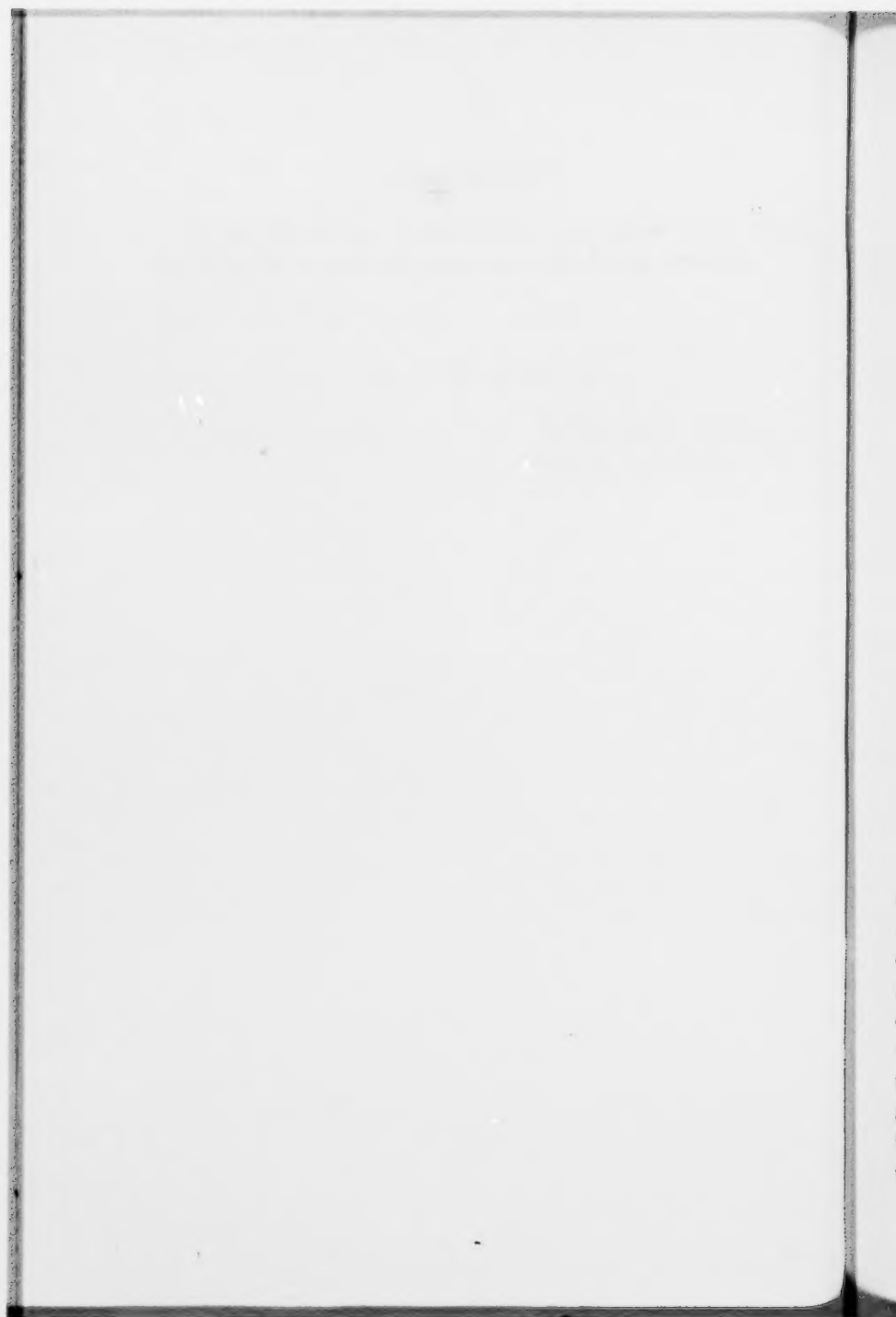
**It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.**

Dated, New York, March       , 1942.

Respectfully submitted,

VALENTINE B. HAVENS,  
*Attorney for Petitioners.*







## A P P E N D I X

REVENUE ACT OF 1926, C. 27, 44 STAT. 9:

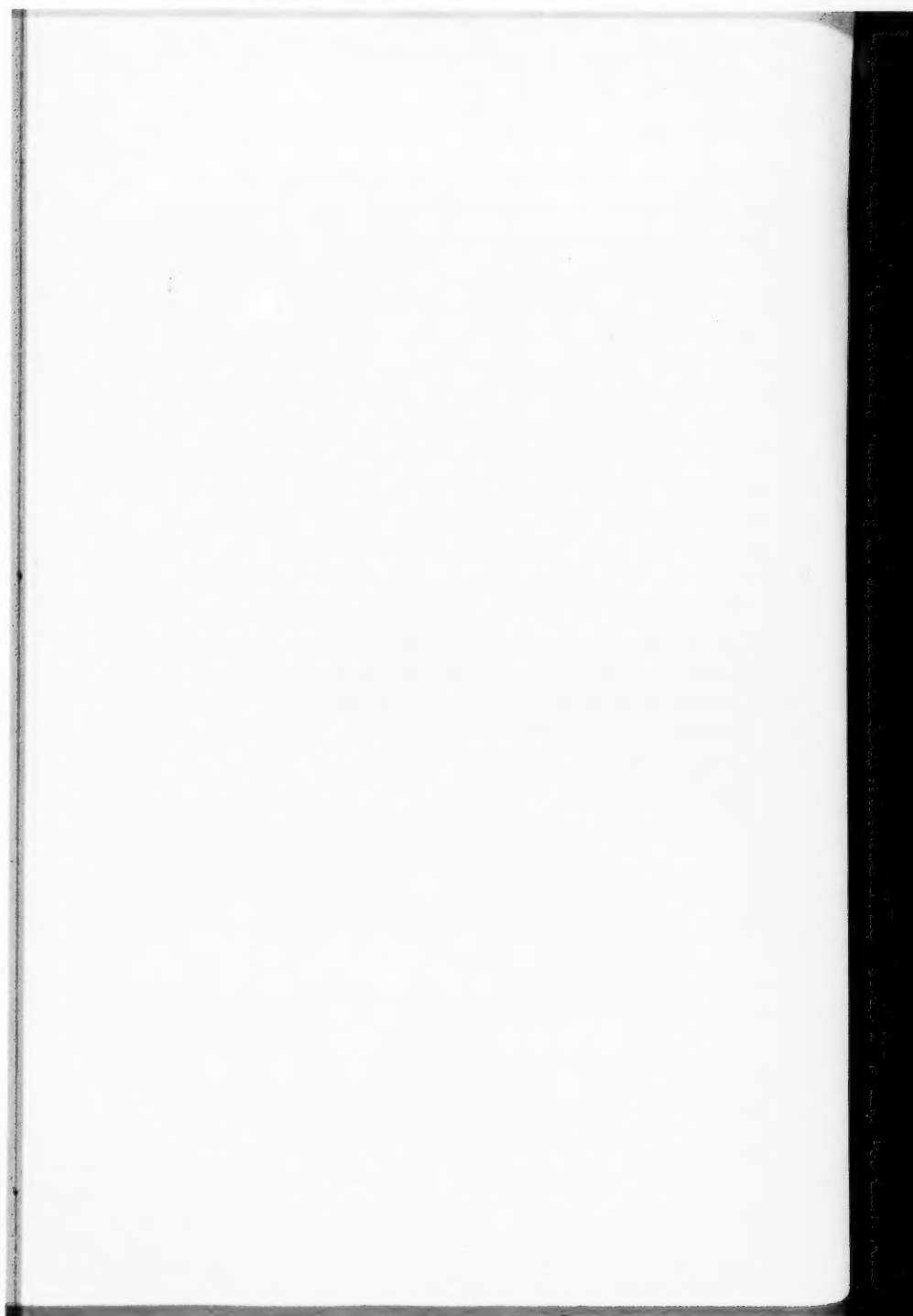
Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . .

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of \$5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (U. S. C., Title 26, Sec. 411.)

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of \$5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title. (U. S. C., Title 26, Sec. 411.)





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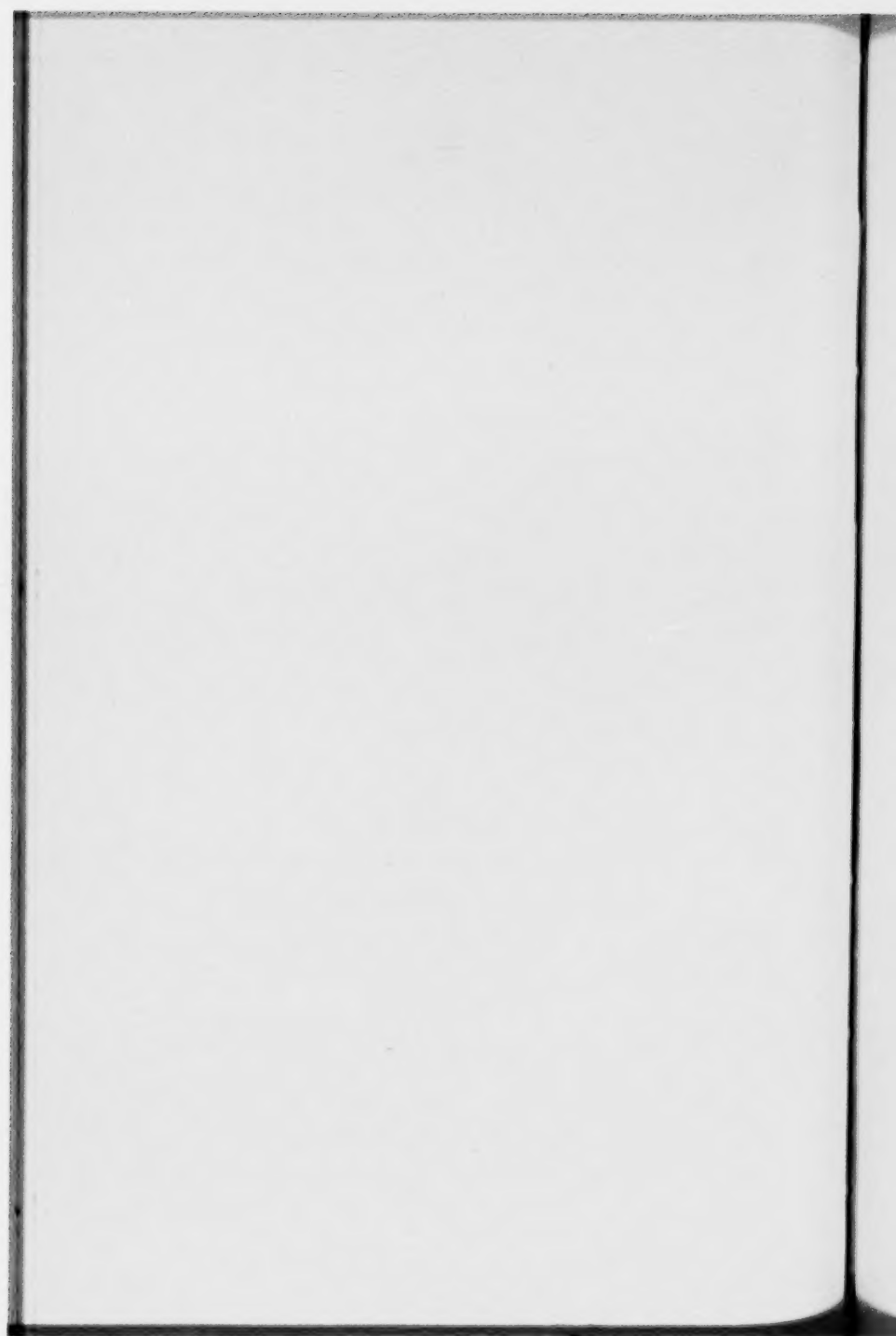
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# ***In the Supreme Court of the United States***

OCTOBER TERM, 1941

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No. 1037

THE BRIDGEPORT CITY TRUST COMPANY AND ARTHUR  
E. ALLING, EXECUTORS OF THE ESTATE OF NOYES  
E. ALLING, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT*

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## **BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### **OPINIONS BELOW**

The opinion of the Board of Tax Appeals (R. 15-21) is reported in 41 B. T. A. 191. The opinion of the Circuit Court of Appeals (R. 38-42) is reported in 124 F. (2d) 48.

### **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on December 31, 1941 (R. 42-43). The petition for a writ of certiorari was filed

March 13, 1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

The decedent created an *inter vivos* trust which provided for the payment of the net income to the decedent's three daughters, mentioned by name, and the survivors of any of them as long as any of them should live; after the death of the last survivor, the income was to be distributed to such of decedent's grandchildren as should survive his daughters as long as any of the grandchildren should live; and when all of the grandchildren should be deceased, the corpus of the trust estate was to be divided among such of the decedent's lineal descendants as should survive his grandchildren. The decedent reserved the power at any time to reallocate the disposition of the income of the trust fund, such reallocation, however, to be limited to those "named as beneficiaries" therein. The questions presented are:

1. Whether the value at the date of decedent's death of the life estates, with respect to which the decedent retained a power of reallocation, should be included in the decedent's gross estate as a transfer subject to change through the exercise of a power by the decedent to alter, amend or revoke within the meaning of Section 302 (d) of the Revenue Act of 1926.



2. Whether the decedent's power of reallocation embraced the life estates of his grandchildren, as well as the life estates of his daughters.<sup>1</sup>

#### STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 11-14.

#### STATEMENT

The facts, found by the Board of Tax Appeals as stipulated (R. 16-18), may be summarized as follows:

The taxpayers are the executors of the estate of Noyes E. Alling, who died on June 19, 1934, a resident of the City of Bridgeport, Connecticut (R. 16).

On January 10, 1929, the decedent transferred in trust certain securities which, as of the date of decedent's death, had a fair market value of \$138,735.12 (R. 16). The trust agreement provides in part as follows (R. 16-17):

1. \* \* \* (a) To pay the net income in quarterly installments unto my daughters, Edna Alling Doherty, of Bridgeport, Conn., Madeline Alling Mason, of Bridge-

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<sup>1</sup> Should the writ be granted, the Government would urge in support of the decision below that the value of the life estates was includable in decedent's gross estate as a transfer intended to take effect at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926. The court below found it unnecessary to pass upon this contention (R. 42).

port, Conn., and Ruth Alling Barber, of Wilkes Barre, Penn., or the survivor or survivors of any of them, share and share alike, as long as they or any of them shall live.

(b) After the death of all of said beneficiaries, said net income shall be distributed unto as many of my grandchildren as shall survive my said daughters, share and share alike, as long as they or the survivor or survivors of any of them shall live.

(c) When all of said grandchildren shall be deceased, the corpus of said Trust Estate shall be equally divided among such of my lineal descendants as shall survive my said grandchildren, share and share alike, to belong to them and each of them absolutely and forever.

(d) If there should be no lineal descendants of mine who shall survive my said grandchildren, then I order and direct that the corpus of said Trust Estate be equally distributed between the Bridgeport Hospital and the Boys' Club of Bridgeport, to belong to them and each of them and their successors and assigns absolutely and forever.

2. I reserve to myself the power at any time to reallocate the disposition of the income of this said trust fund, such re-allocation, however, to be limited strictly to those named as beneficiaries herein; and no such re-allocation shall be made except by

notice in writing to be given to the Trustee hereinafter of such re-allocation.<sup>2</sup>

The fair market value, as of the date of decedent's death on June 19, 1934, of the life estates granted to the decedent's three daughters was \$88,225.82 (R. 18). The fair market value, as of the date of decedent's death, of the life estates of the three daughters and of the decedent's three grandchildren was \$120,949.28 (*id.*).

The Commissioner determined a deficiency against the estate of the decedent arising from the inclusion in the gross estate for estate tax purposes of the full value of the corpus of the trust (R. 15). The Board of Tax Appeals disapproved this determination (R. 18-21), but the court below reversed the decision of the Board insofar as it failed to include in the gross estate the fair market value, as of the date of the decedent's death, of the life interests of the decedent's three daughters and the decedent's three grandchildren (R. 38-42).

#### ARGUMENT

1. The court below held that the value, as of the date of the decedent's death in 1934, of the life interests in the trust with respect to which

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<sup>2</sup> The Connecticut Supreme Court of Errors held that the trust did not violate the rule against perpetuities (125 Conn. 599; R. 17-18). The parties stipulated and the Board found that the trust was not created in contemplation of death within the meaning of Section 302 (c) of the 1926 Act (R. 17).

the decedent had reserved a power of reallocation, should be included in his gross estate under Section 302 (d) of the Revenue Act of 1926 (Appendix, *infra*, p. 11). This decision is, we submit, clearly correct and is not in conflict with any decision of this Court or of any other Circuit Court of Appeals.

Section 302 (d) provides that there shall be included in the gross estate of a decedent the value at the time of his death of all property "To the extent of any interest therein" of which the decedent has at any time made a transfer where the enjoyment thereof was subject at the date of his death "to any change" through the exercise of a power by the decedent to alter, amend or revoke.

In the present case the enjoyment by the decedent's children and grandchildren of their interests in the trust created by him were subject at the date of his death to change by him through the exercise of a power to alter the trusts. By virtue of the reserved power of reallocation, the decedent could have limited any, or all but one, of his children and grandchildren to a nominal amount and given substantially all, if not all, of the income to one or to such of them as he pleased. The operation of Section 302 (d) is not limited to cases where the decedent reserves the power to alter each and every interest in the property transferred in trust. If the enjoyment of *any*

interest in the trust is subject to change by the decedent at the date of his death, the value of the property at the time of his death *to the extent of that interest* is by the clear and unambiguous language of the statute required to be included in the decedent's gross estate.

The decision of the court below merely holds that the value at the date of decedent's death of those interests, the enjoyment of which was still subject to the control of the decedent, should be included in his estate. This ruling is in complete accord with *Chickering v. Commissioner*, 118 F. (2d) 254 (C. C. A. 1st), certiorari denied, October 13, 1941, No. 153, present Term; *Millard v. Maloney*, 121 F. (2d) 257 (C. C. A. 3rd), certiorari denied, October 13, 1941, No. 324, present Term; *Guggenheim v. Helvering*, 117 F. (2d) 469 (C. C. A. 2nd), certiorari denied, October 13, 1941, No. 125, present Term; *Commissioner v. Chase Nat. Bank*, 82 F. (2d) 157 (C. C. A. 2nd), certiorari denied, 299 U. S. 552; *Holderness v. Commissioner*, 86 F. (2d) 137 (C. C. A. 4th); and *Hoblitzelle v. United States*, 3 F. Supp. 331 (C. Cls.).

The decision of the court below is not, as alleged by the petitioners, in conflict with the decision of the Court of Appeals for the District of Columbia in *Helvering v. Helmholz*, 75 F. (2d) 245, or with the decision of this Court in that case, 296 U. S. 93. A similar allegation of conflict was made in the petitions for certiorari in *Chickering v. Com-*

*missioner, supra*, and in *Millard v. Maloney, supra*, but in both cases this Court denied the writ. In the *Helmholz* case the decedent had made a transfer in trust naming herself as one of the beneficiaries and reserving to herself as a beneficiary the right to join with all the other beneficiaries in terminating the trust. This Court held that such a power was not to be considered as a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d). That holding is not opposed to the conclusion of the court below, for, to the extent that the right to recall in that case was conditioned upon the consent of all the beneficiaries, the transfer was in effect an absolute one.

The petitioners refer, as did the petitioners in the *Chickering* and *Millard* cases, *supra*, to the fact that in the *Helmholz* case the decedent had the right by will to appoint her husband as the recipient of the income for the duration of his life and that that right was exercised by the decedent. The petitioners argue that this Court was cognizant of the decedent's reservation of a power of appointment over the income of the trust fund and that the Court must have decided that the reservation of the power of appointment over the income of the trust was not within the provisions of Section 302 (d). However, as shown by the opinion of the Court of Appeals for the District of Columbia in the *Helmholz* case, 75 F. (2d) 245,

248, the Commissioner did not appeal the Board's holding that the life interest in the income of the trust estate appointed to the husband should not be included in the decedent's gross estate. An examination of the briefs filed in this Court shows that no argument was made that either the existence or exercise of the power of appointment brought the trust property within Section 302 (d). The holding in that case must be confined, therefore, to the issue actually decided, namely, that the power of a grantor who is also a beneficiary to join with the other beneficiaries in terminating the trust is not a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d).

*McFadden v. United States*, 20 F. Supp. 625 (E. D. Pa.), cited by the petitioners (Pet. 8), was not appealed by the Government. The main ground of the decision in that case was that the right which the decedent reserved was to direct the shares of income to be paid to his wife and children *during his lifetime only* and that the shares of those who were to take income and principal after his death were definitely fixed and vested by the provisions of the deed of trust at the time it was executed. It is true that the court stated that, even if the decedent had reserved a power to change the shares of income which his wife and children should receive after his death, this alone would not appear to be such

a power to alter or amend as the statute contemplates. But this statement is, we believe, clearly inconsistent with the later decision of the Circuit Court of Appeals for the Third Circuit in *Millard v. Maloney, supra*.

2. The petitioners presented the alternative argument in the court below that the decedent reserved a power of reallocation only with respect to the interests of his three children and in their petition for certiorari they seek to reserve that point for argument on the merits if the writ is granted by this Court. But the question of the construction of the particular trust instrument is of no general importance and the decision below on the point is, we believe, plainly correct. The question, therefore, is not one which warrants review by this Court.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

\* \* \* \*

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \*

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \*

\* \* \* \*

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, inter-

ests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

\* \* \* \*

Section 302 (c) of the Revenue Act of 1926 was amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and further amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, in respects not material to the present case. Section 302 (d) of the Revenue Act of 1926 was amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680, in respects not material to the present case.

**Treasury Regulations 80 (1934 edition):**

ART. 15. *Transfers during life*.—The following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: \* \* \* (4) transfers in which the decedent retains, either alone or in conjunction with any person or persons, the right to designate who shall possess or enjoy the property or the income thereof, if made after the enactment of the Revenue Act of 1916 (see article 19 and the exceptions stated therein); and (5) transfers made before or after the enactment of the Revenue Act of 1916 in which the enjoyment of the transferred property was subject at decedent's death to any change through the exercise, either by decedent alone or with other person or persons, of a power to alter, amend, or re-

voke, or if after the enactment of the Revenue Act of 1916 such a power was relinquished by the decedent in contemplation of death (see articles 20 and 21).

The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

\* \* \* \* \*

ART. 19. *Transfers with right retained to designate who shall possess or enjoy.*—(a) *Transfers included.*—The statutory phrase, "a transfer \* \* \* intended to take effect in possession or enjoyment at or after his death," includes a transfer, by trust or otherwise, in connection with which the decedent retained, either to himself alone or in conjunction with any other person or persons, the right for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence an intention that such right should continue throughout his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof. (See article 15.)

(b) *Taxability.*—Such a transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), in connection with which the right so to designate is limited to pos-

session, enjoyment, or income for the period of decedent's life, or one ascertainable only by reference to his death, or for one evidencing intent that it should extend for at least the duration of decedent's life, is taxable if made subsequent to the enactment of the Revenue Act of 1916.

If, however, the right to designate is not so limited, but is subject to such an exercise as would determine the ultimate disposition of the property or any part thereof or interest therein, then to that extent the transfer is taxable whether made before or after the enactment of the Revenue Act of 1916.

The provisions of the first paragraph of this subdivision are subject to the same exception as stated in subdivision (b) of article 18.

ART. 20. *Power to change enjoyment.*—The value of the property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate, whether the transfer was made before or after the enactment of the Revenue Act of 1916, if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

